UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

2009 MSPB 23

Docket No. DA-0752-08-0261-I-1

Scot R. Winlock, Sr.,

Appellant,

v.

Department of Homeland Security,

Agency.

March 6, 2009

Philip L. Watson, Esquire, Oklahoma City, Oklahoma, for the appellant.

Kim E. Garcia, Esquire, Coppell, Texas, for the agency.

BEFORE

Neil A. G. McPhie, Chairman
Mary M. Rose, Vice Chairman

OPINION AND ORDER

¶1 The agency has petitioned for review of an initial decision that reversed the appellant's removal. For the reasons set forth below, we GRANT the agency's petition for review under 5 C.F.R. § 1201.115(d), REVERSE the initial decision, and SUSTAIN the removal action.

BACKGROUND

¶2 Effective February 8, 2008, the agency removed the appellant from his Transportation Security Manager position with the Transportation Security Administration (TSA) based on his unsatisfactory performance in that he failed two Standard Operating Procedures Quizzes (SOPQs) and, therefore, received a

"Does Not Meet Standards" performance rating in the critical element Management and Technical Proficiency of his performance plan. Initial Appeal File (IAF), Tab 6, Subtabs 4a, 4b, 4d. The appellant appealed the removal action and contended that his performance was not unsatisfactory. IAF, Tab 1.

¶3 After affording the appellant his requested hearing, the administrative judge (AJ) issued an initial decision in which she found that the agency failed to prove that the appellant's performance was unsatisfactory. Initial Decision (I.D.) at 4-14. She thus reversed the appellant's removal. *Id.* at 1, 14.

¶4 The agency petitions for review of the initial decision. Petition for Review (PFR) File, Tab 1. The appellant responds in opposition to the petition for review. *Id.*, Tab 4.

ANALYSIS

¶5 Because the appellant was an employee of TSA, this appeal is governed by the provisions of the Aviation and Transportation Security Act (ATSA). *Connolly v. Department of Homeland Security*, 99 M.S.P.R. 422, ¶ 9 (2005). Under ATSA, TSA employees are covered by the personnel management system that is applicable to employees of the Federal Aviation Administration (FAA) under 49 U.S.C. § 40122, except to the extent the Administrator of TSA modifies that system as it applies to TSA employees. 49 U.S.C. § 114(n); *Connolly*, 99 M.S.P.R. 422, ¶ 9; *Lara v. Department of Homeland Security*, 97 M.S.P.R. 423, ¶ 9 (2004). Under 49 U.S.C. § 40122(g)(2), many of the provisions of title 5 do not apply, including, notably, chapter 75. Thus, the Board has held that chapter 75 does not apply to the FAA and, instead, the FAA's internal procedures are applicable. *See Hart v. Department of Transportation*, 109 M.S.P.R. 280, ¶¶ 10-11 (2008).

¶6 Pursuant to ATSA, the Administrator of TSA *has* modified the FAA's system by issuing Management Directive (MD) 1100.75-3, "Addressing Conduct and Performance Problems," on September 17, 2004. IAF, Tab 6, Subtab 4cc.

MD 1100.75-3 does not purport to modify the list of title 5 provisions that are expressly applicable to the FAA and, thus, we conclude that the exclusions set forth in 49 U.S.C. § 40122(g)(2) also apply to the TSA. Therefore, as the AJ correctly found, the provisions of MD 1100.75-3, rather than chapter 75, apply to this appeal. IAF, Tab 24.

¶7 Further, as we recently held in *Roche v. Department of Transportation*, 110 M.S.P.R. 286, ¶ 17 (2008), only an individual who is an "employee" under 5 U.S.C. § 7511(a)(1) is entitled to appeal his removal to the Board under 49 U.S.C. § 40122(g)(3). Because the appellant's position was in the excepted service, *see* IAF, Tab 6, Subtab 4u, and because he is not preference eligible, *id.*, he must show that he has completed two years of current continuous service in the same or similar positions under other than a temporary appointment limited to two years or less. *See* 5 U.S.C. § 7511(a)(1)(C)(ii).

¶8 The record is undisputed that the appellant was promoted to the position of Screening Manager effective April 4, 2004. IAF, Tab 6, Subtab 4dd. On April 1, 2007, as a result of a position review, the appellant's position was changed to Transportation Security Manager. *Id.*, Subtab 4u. The agency states, and the appellant does not dispute, that the change involved only a change in job title and that the appellant's duties remained the same as they had been. *Id.*, Subtab 1 at 1 n.1. He was removed from the Transportation Security Manager position effective February 8, 2008. *Id.*, Subtabs 4a, 4b. Under the circumstances of this case, the appellant had completed more than two years of current continuous service in the same or similar positions under other than a temporary appointment limited to two years or less. Thus, he is an "employee" under 5 U.S.C. § 7511(a)(1)(C)(ii) and he is entitled to appeal his removal to the Board under 49 U.S.C. § 40122(g)(3). *See Roche*, 110 M.S.P.R. 286, ¶ 17.

¶9 The legal standard to be applied in this case is to be found in MD 1100.75-3, which "sets forth the [agency's] policies and procedures on the use of disciplinary and adverse actions to address employee performance and conduct

problems." IAF, Tab 6, Subtab 4cc at 1, ¶ 1. The agency's policy provides that an employee may be removed "for such cause as will promote the efficiency of the service":

> This standard generally means that the action against an employee must be taken to further a legitimate government interest, e.g. because of the employee's (1) failure to accomplish his or her duties or fulfill his or her employment obligations satisfactorily, (2) interference with other employees' performance of their duties, or (3) detrimental effect on the agency's ability to accomplish its mission.

Id. at 3, ¶ 6.B.1. Further, the agency's policy requires that there be a "nexus, or connection, between a legitimate government interest and the employee misconduct or matter that is the basis for the disciplinary action." *Id.*, ¶ 6.B.2. However, "[n]exus is presumed when the basis for disciplinary action is an employee's unsatisfactory job performance." *Id.*

¶10 The agency has a policy of progressive discipline, but permits removal as the first action taken against an employee "where the [performance is] so serious as to warrant removal." *Id.* at 4, ¶ 6.D.3. As to determining the penalty for any particular action, MD 1100.75-3 states:

> The following factors should be considered to determine an appropriate penalty. The considerations are often referred to as the "*Douglas* factors," based on a Merit Systems Protection Board (MSPB) case where these considerations were set forth. See *Douglas v. Veteran's* [sic] *Administration*, 5 M.S.P.R. 280 (1981). Not all of the factors are relevant in all cases, and other factors relevant to the case may also be considered.

Id. at 5, ¶ 6.F. The agency's policy then goes on to list the *Douglas* factors. *Id.* at 5-6; *see Douglas*, 5 M.S.P.R. at 305-06.

¶11 In other words, to prevail in an appeal of an adverse action before the Board, the agency must show that its action is for such cause as will promote the efficiency of the service, there is a nexus between a legitimate government interest and the matter that forms the basis for the action (although nexus is presumed when the charge is unsatisfactory performance, as here), and the

penalty must be "appropriate" taking into account the relevant *Douglas* factors and any other relevant considerations. The agency's policy does not state the quantum of proof that the agency must meet before the Board. However, pursuant to 5 U.S.C. § 7701(c)(1)(B), which remains applicable to the agency under 49 U.S.C. §§ 114(d) and 40122(g)(2), *see Hart*, 109 M.S.P.R. 280, ¶¶ 9-10, the agency must prove its charges and its case by a preponderance of the evidence.

¶12 Turning to this appeal, the material facts are not disputed. During the relevant time period, the agency operated under a performance management system known as the Performance Accountability and Standards System (PASS). IAF, Tab 6, Subtabs 4q, 4v, 4x, 4bb. Under PASS, Security Managers such as the appellant were rated on six critical elements known as "performance components": Management and Technical Proficiency; Competencies; Readiness for Duty–Dependability only; Supervisory Accountability; Training and Development; and Collateral Duties. *Id.*, Subtabs 4x at 6-7, 4bb at 6. A Security Manager's Technical Proficiency under the Management and Technical Proficiency critical element was judged in terms of his technical knowledge of standard operating procedures (SOPs) for passenger and baggage screening. *Id.*, Subtabs 4q at 9, 4v at 6. The agency measured knowledge of SOPs by administering mandatory SOPQs. *Id.*, Subtabs 4q at 9, 4v at 6, 10. Security Managers were required to achieve scores of at least 80% on two SOPQs and those who did not do so "[would] be subject to termination." *Id.*, Subtab 4v at 6-7, 10. A Security Manager who did not pass the SOPQs could not receive an "Achieves Standards" rating under the Management and Technical Proficiency critical element, and a Security Manager who did not receive an "Achieves Standards" rating on the Management and Technical Proficiency critical element could not receive a summary performance rating of "Achieves Standards." Hearing Transcript (Tr.) at 44-45 (testimony of Training Coordinator Alvin Burns).

¶13 It is not disputed that the appellant passed SOPQ1 on January 13, 2007, and was not required to take SOPQ2. Tr. at 18, 34 (testimony of Burns). It is also not disputed that the appellant did not score at least 80% when he took SOPQ3 on May 30, 2007. IAF, Tab 6, Subtab 4gg at 5; Tr. at 19 (testimony of Burns). In accordance with the agency's procedure, IAF, Tab 6, Subtabs 4o, 4t, he was afforded thirty minutes of remediation immediately after the test, which included a detailed analysis of his incorrect quiz answers with the correct answers and a reference to the portion of the SOPs in which the correct answers could be found. Tr. at 19-22 (testimony of Burns); IAF, Tab 6, Subtabs 4l, 4r. In addition, he was placed on a performance improvement plan (PIP), under which he was required to take a forty-hour Basic Screener Training (BST) course. IAF, Tab 6, Subtab 4n; Tr. at 20 (testimony of Burns). The appellant successfully completed the BST course and, as a result, he completed the PIP successfully on August 16, 2007. Tr. at 20-21 (testimony of Burns); IAF, Tab 6, Subtab 4ff at 3. Following completion of the BST, the appellant was required to take SOPQ4. Tr. at 34 (testimony of Burns). He was given several weeks to study the SOP and was permitted to take SOPQ4 when he indicated he was ready to do so. It is further undisputed that the appellant took SOPQ4 on August 31, 2007, and did not achieve a score of at least 80%. IAF, Tab 6, Subtab 4gg at 5; Tr. at 22, 29 (testimony of Burns). Because he did not pass SOPQ4, he received a "Does Not Meet Standards" rating for the performance element Management and Technical Proficiency. IAF, Tab 6, Subtab 4k at 5; Tr. at 44-45 (testimony of Burns).

¶14 Based on the appellant's failure of SOPQ4 and his resultant failure to meet the performance requirements for the Management and Technical Proficiency critical element of his performance standards, the agency proposed the appellant's removal on the grounds of unsatisfactory performance. IAF, Tab 6, Subtab 4d. After considering the appellant's written reply to the notice of proposed removal, *id.*, Subtab 4c, and based on his assessment of the *Douglas* factors, *id.*, Subtab 4f, the deciding official removed the appellant from his

position effective February 8, 2008. IAF, Tab 6, Subtabs 4a, 4b. On March 25, 2008, the Administrator of TSA announced that, effective April 1, 2008, the agency would not administer any further SOPQs in 2008. IAF, Tab 14, Appellant's Exhibit B.

¶15 The AJ concluded that the agency failed to prove that the appellant's failure of SOPQ4 constituted unsatisfactory performance. I.D. at 13-14. She found that the agency failed to show that the quizzes accurately measured the appellant's performance under the Management and Technical Proficiency critical element. *Id.* She also determined that the agency's decision to eliminate the quizzes in 2008 tended to support the appellant's position that the SOPQs did not evaluate his performance. I.D. at 13.

¶16 In reaching this conclusion, however, the AJ discounted the agency's evidence concerning the purpose and nature of the SOP quizzes. Alvin Burns, the agency's Training Coordinator at the appellant's duty station, testified that the SOPs set forth "the guidelines for ensuring the safety of the travel of [the agency's] passengers." Tr. at 12-13. The agency had both a management SOP and an SOP that contained the procedures for screening passengers and baggage. Tr. at 15. The agency required Security Managers to know the SOP because they supervise the agency's Screeners, who are the employees who actually perform the procedures. Tr. at 16. Burns explained that a Security Manager's knowledge of the SOPs was essential to his ability to detect when a Screener was not performing screening duties properly. Tr. at 16.

¶17 Assistant Federal Security Director for Training Robert Johnson also testified about the significance of the SOPs. He testified that the SOPs were the "total guidelines that we operate under on the [passenger security] checkpoint and in baggage, and the screening manager needs to have a strong working knowledge of that document in order to make sure that the operations are run correctly and that the procedures are followed so that the traveling public can be safe on their planes." Tr. at 49. He explained that a Security Manager's failure of an SOPQ

would have an impact on the morale of the workforce: "The fact that he did not demonstrate the ability that he was completely knowledgeable in the SOP could certainly diminish the confidence of the workforce in [the appellant's] ability to provide the correct answers in a time of need." Tr. at 55-56. He expressed concern that, because the SOPs were "the bible of screening operations at the airport," and because Screeners also had to take SOPQs, if a Security Manager could not pass an SOPQ, the employees would lose their confidence in the Security Manager "in the event of an emergency or something happens, about getting the right answer." Tr. at 60.

¶18 Deciding official Stephen Cortright, Federal Security Director, also testified about the importance of the SOPQs. He described the agency's mission as "the protection of the traveling public." Tr. at 86. He stated:

> Many of these tasks are performed under stress and under split-second decision making by the – by the employees and the managers and the supervisors involved. I think that a – the test that – relating to the standard operating procedures that are to be utilized and to know what those procedures are to be – how they are to be executed, is essential to our mission. And if you cannot or you are not aware of those standard operating procedures and how they may change from time to time and how they are implemented, then the efficiency of our service and our mission are not promoted.

Id.

¶19 Phil Anderson, during the relevant time period, was the agency's Director for the Office of Performance Management and Improvement, and was responsible for the design, development, implementation, and management of PASS, including creation and administration of the SOPQs. Tr. at 112-15. Anderson testified that the agency required Security Managers to take and pass the SOPQs for several reasons. First, he testified that Security Managers needed to know the SOPs so they would be able to answer their subordinates' questions about the SOPs and requests for clarification of the SOPs. Tr. at 116. Second, he testified that Security Managers needed to know the SOPs so they would be able

to recognize during their observation of their subordinates' job performance whether the subordinates were performing their duties properly, and to provide correction if necessary. Tr. at 116. Third, he testified that, during the development of PASS, Security Managers as a group informed his office "that they wanted to start taking the assessments because they were getting a little bit fed up at the time with the perception by their employees that the security managers didn't know the SOPs." Tr. at 117. He testified that 98% of Security Managers passed the SOPQs on the first or second attempt, and they passed at the same rate as the general population of employees who took the quizzes. Tr. at 117-18.

¶20 In her initial decision, the AJ gave significant weight to the fact that the appellant received a "Does Not Meet Standards" on only the Technical Proficiency portion of the Management and Technical Proficiency critical element, and received at least an "Achieves Standards" rating on the five other critical elements of his performance plan as well as on the other components of the Management and Technical Proficiency critical element. I.D. at 13. However, in chapter 43 performance cases, the agency need only prove that the appellant's performance was unsatisfactory in at least one critical element. *See Thompson v. Department of the Navy*, 89 M.S.P.R. 188, ¶ 5 (2001). Similarly, in a performance-based action taken under chapter 75, where all charges are sustained, an agency's penalty decision is entitled to deference and is reviewed only to determine whether the agency responsibly balanced the relevant factors in the individual case. *See Shorey v. Department of the Army*, 77 M.S.P.R. 239, 245, *review dismissed*, 155 F.3d 572 (Fed. Cir. 1998) (Table); *Madison v. Defense Logistics Agency*, 48 M.S.P.R. 234, 239 (1991). Here, the agency has presented evidence that a Security Manager's technical knowledge of the SOPs as measured by the SOPQs is so important that it is an essential component of the Management and Technical Proficiency critical element of the Security Managers' performance plan. IAF, Tab 6, Subtabs 4k, 4v; Tr. at 140 (testimony

of Anderson). The managers of federal agencies, not the members of the Board, have the authority to decide what agency employees must do in order to perform acceptably in their particular positions. *Jackson v. Department of Veterans Affairs*, 97 M.S.P.R. 13, ¶ 14 (2004). Further, agencies are entitled to use their managerial discretion in establishing the performance standards by which an employee's performance is to be measured. *See Thompson*, 89 M.S.P.R. 188, ¶ 5.* As described above, the agency presented significant testimonial evidence showing that it had established Technical Proficiency, as measured by SOPQs, as an essential component of the Management and Technical critical element of the Security Manager position, as well as convincing testimony explaining why it believed a Security Manager's knowledge of the SOPs was critical to its mission. We discern no compelling reason to disturb the agency's exercise of its discretion in establishing the performance standards of the Security Manager position, and we find that the AJ erred by discounting the agency's evidence.

¶21 Further, contrary to the AJ's finding, I.D. at 13, the agency's decision to discontinue the SOPQs in 2008 is not an indication that the agency thought the quizzes were not a valid measure of Security Managers' Technical Proficiency with the SOPs. Anderson explained that the decision to discontinue the quizzes for 2008 reflected the evolution of how the agency performs its mission. Tr. at 126-28. He testified that the agency places a lesser value on rote memorization of the procedures contained in the SOPs and a greater value on a more flexible performance of the agency's mission: "[I]f we do everything the same, day in

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* Both *Jackson* and *Thompson* are, of course, cases involving allegations of unacceptable performance brought under chapter 43. As noted above, TSA is not covered by many of the provisions of title 5, including chapter 43. *See Hart*, 109 M.S.P.R. 280, ¶¶ 9-10. Thus, the notions of management discretion discussed in those cases are not directly applicable here. Nevertheless, we find no indication that the Administrator of TSA intended for agency managers to have less discretion in managing cases of unacceptable performance under MD 1100.75-3 than they would have under chapter 43.

and day out, then that allows the people that [sic] intend to do us harm opportunities to figure out where the holes in the process are." Tr. at 127; *see* Tr. at 134-35. As part of its exercise of management discretion, an agency will from time to time change a position's critical elements and the means by which an employee's performance is measured. Management expertise resides with the agency, not with the Board. *McClaskey v. Department of Energy*, 720 F.2d 583, 588 n.2 (9th Cir. 1983); *see Jackson*, 97 M.S.P.R. 13, ¶ 14. Absent some evidence that the agency intended its change in the SOPQ policy to be retroactive, we see no reason to conclude that the agency's discretionary decision to change the means by which it measured Technical Proficiency in performance years subsequent to the one at issue in this appeal requires overturning the agency's charge.

¶22 In addition, we reject the AJ's finding that there was no evidence that the SOPQs measured the appellant's performance. I.D. at 13-14. The AJ suggests in the initial decision, *id.*, and in several of her comments during the hearing, Tr. at 8, 101-02, 105, 144, that a twenty-five question quiz on the SOPs would not measure actual on the job performance as accurately as direct observation would. The agency presented significant testimonial evidence concerning how the quizzes were developed and tested before they were administered to the employees, including the efforts the agency took to ensure that the quizzes were fair, did not test on overly obscure concepts, and were not so difficult that most employees could not pass them. Tr. at 113-15 (testimony of Anderson). In fact, 98% of Security Managers passed the quizzes on the first or second attempt, a pass rate consistent with that of the general population of employees who were required to take the quiz. Tr. at 117-18 (testimony of Anderson). Perhaps the agency could have developed some means of assessing Technical Proficiency via direct observation of the Security Managers' performance of their duties. However, the agency had considerable discretion to determine what the performance elements for that position would be and how it would be measured.

Our task is to ensure that the agency proved by preponderant evidence that the appellant did not meet the performance standards of his position, not that his performance standards contain the most accurate of all hypothetical performance assessment strategies.

¶23 We find, therefore, that the performance standards at issue in this appeal were not an abuse of the agency's broad management discretion. We also find, based on the undisputed facts of record, that the appellant did not meet his performance standards because the documentary evidence shows, IAF, Tab 6, Subtab 4gg at 5, and the appellant concedes, IAF, Tab 14 at 2, Tab 17 at 2, Tab 20 at 1 n.2, that he did not pass SOPQ3 or SOPQ4. Thus, we find that the agency has proven by preponderant evidence its charge of unsatisfactory performance.

¶24 We must next determine whether the appellant's removal promotes the efficiency of the service. Under well-established Board case law, the nexus requirement, for purposes of whether an agency has shown that its action promotes the efficiency of the service, means there must be a clear and direct relationship between the articulated grounds for an adverse action and either the employee's ability to accomplish his or her duties satisfactorily or some other legitimate government interest. *Merritt v. Department of Justice*, 6 M.S.P.R. 585, 596 (1981), *modified*, *Kruger v. Department of Justice*, 32 M.S.P.R. 71, 75 n.2 (1987). This definition is substantively consistent with the agency's policy, which requires a connection between a legitimate government interest and, inter alia, the matter that is the basis for the disciplinary action. *See* IAF, Tab 6, Subtab 4cc at 3, ¶¶ 6.B.1-B.2. In fact, the agency's Management Directive provides that nexus is presumed in cases of unsatisfactory performance. *Id.* at 3, ¶ 6.B.2. We find, therefore, that the agency has proven that disciplinary action promotes the efficiency of the service.

¶25 Finally, we must consider whether the penalty of removal constitutes an abuse of the agency's broad discretionary authority. *Cf. Gray v. U.S. Postal*

Service, 97 M.S.P.R. 617, ¶ 11 (2004) (the Board's review with regard to its review of an agency's penalty selection is not to displace management's responsibility, but to determine whether management exercised its judgment within the tolerable limits of reasonableness), *aff'd*, No. 05-3074, 2005 WL 1368093 (Fed. Cir. June 9, 2005). The agency's Management Directive requires the deciding official to consider the *Douglas* factors along with all other factors that may be relevant in each individual case. IAF, Tab 6, Subtab 4cc at 5-6, ¶ 6.F. The record contains a *Douglas* Factors Worksheet that the deciding official completed and which documents his consideration of the *Douglas* factors, particularly the absence of any prior disciplinary record, the appellant's previous record of dependability and good performance, and the consistency of the removal penalty with agency policy. *Id.*, Subtab 4f; Tr. at 86-87. In addition, the deciding official testified that he considered reassigning the appellant instead of removing him, but there were no available vacant positions for which the appellant qualified that did not involve screening duties. Tr. at 81-82.

¶26 The foregoing demonstrates that the deciding official considered the *Douglas* factors most relevant to this case and that the penalty of removal is within the tolerable limits of reasonableness. *See Shorey*, 77 M.S.P.R. at 245. Accordingly, we SUSTAIN the appellant's removal.

ORDER

¶27 This is the final decision of the Merit Systems Protection Board in this appeal. Title 5 of the Code of Federal Regulations, section 1201.113(c) (5 C.F.R. § 1201.113(c)).

NOTICE TO THE APPELLANT REGARDING YOUR FURTHER REVIEW RIGHTS

You have the right to request the United States Court of Appeals for the Federal Circuit to review this final decision. You must submit your request to the court at the following address:

United States Court of Appeals
for the Federal Circuit
717 Madison Place, N.W.
Washington, DC 20439

The court must receive your request for review no later than 60 calendar days after your receipt of this order. If you have a representative in this case and your representative receives this order before you do, then you must file with the court no later than 60 calendar days after receipt by your representative. If you choose to file, be very careful to file on time. The court has held that normally it does not have the authority to waive this statutory deadline and that filings that do not comply with the deadline must be dismissed. *See Pinat v. Office of Personnel Management*, 931 F.2d 1544 (Fed. Cir. 1991).

If you need further information about your right to appeal this decision to court, you should refer to the federal law that gives you this right. It is found in Title 5 of the United States Code, section 7703 (5 U.S.C. § 7703). You may read this law, as well as review the Board's regulations and other related material, at our website, http://www.mspb.gov. Additional information is available at the court's website, www.cafc.uscourts.gov. Of particular relevance is the court's "Guide for Pro Se Petitioners and Appellants," which is contained within the court's Rules of Practice, and Forms 5, 6, and 11.

FOR THE BOARD:

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William D. Spencer
Clerk of the Board
Washington, D.C.